APPEAL NO. 021994
FILED SEPTEMBER 23, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on July 10, 2002. The hearing officer determined that the respondent (claimant) had disability from a burned hand for the period from _____, through February 13, 2002. The appellant (carrier) appeals the length of the disability period, and the claimant responds.

DECISION

We reverse and remand.

The claimant burned his hand (described as second or third degree burns) when hot tar adhered to it, on _____. He had worked for the employer for two months, and was 17 years old at the time of his injury.

The claimant was initially seen by a medical doctor, who debrided the burn wound, and took him off work pending reevaluation on October 22, 2001. This same doctor noted on that date that the hand was healing well and the claimant was to follow up in one week. The claimant changed treating doctors to a chiropractor, Dr. H, who began extensive treatment and therapy. On October 30, 2001, the claimant was evaluated by a pain management doctor who noted that the claimant had almost complete range of motion in his hand only "somewhat diminished" secondary to pain. The pain management doctor noted on November 21, 2001, that the claimant seemed to be improving. There are no comments in these reports about the ability to work.

Dr. H completed monthly Work Status Reports (TWCC-73) which take the claimant off all work but fail to describe in the appropriate space why the injury prevented the claimant from working. The last such TWCC-73 was written out on January 14, 2002, but stated that the reason he could not work (through February 2, 2002) was "further treatment" by the treating doctor. The last progress note submitted from Dr. H's office therapy notes is dated December 21, 2001, and indicates that the claimant has some tenderness in the thumb area and experienced his only discomfort when he flexed his thumb. The two notes before that record that the claimant reported throbbing at night. The medical records do not indicate that the claimant's hand was infected.

In answers to interrogatories, the claimant identified the reason he could not work was that he could not "bend any of the fingers on my left hand". He later adds that blisters and infection were factors. When asked when he had last seen his treating doctor, a chiropractor, the claimant maintained he could "not recall". He did, however, say he stopped seeing the treating doctor because the doctor told him his hand was

"healed" a long time ago. In fact, the claimant testified that Dr. H did not refer him to a specialist because "it wasn't that bad".

The claimant agreed he was able to work when he had seen Dr. X,[1] a doctor for the carrier, but that he could not recall if he could have worked around Christmas time. The claimant's only self-assessment of inability to work was in response to a question as to whether he could have gone back to his previous work seven days after he was injured, and he said no.

What is striking about the record in this case is that the claimant was forthright in stating several times that while he believed that he could have returned to work sooner than the CCH, he was disinclined to do so because it would give an "excuse or reason" to the carrier not to give him any benefits. He said he had spent his time "enjoying my summer".

Dr. X had reviewed the claimant's medical records and examined him on February 14, 2002. He said the claimant's hand was already "healed" when he saw him. He said that within his experience of treating burns similar to this, the claimant should have been capable of returning to light duty work a week after the accident. Dr. X evaluated the claimant to be at maximum medical improvement with a two percent impairment rating for decreased range of motion.

The hearing officer ended disability on the day that the claimant was examined by Dr. X, but not until then, stating that the carrier had failed to prove that disability ended prior to that date by producing evidence to refute the claimant's medical records. This was error, in our opinion, for two reasons. The claimant has the burden of proving disability; it is error to require the carrier to prove when disability stops. Texas Workers' Compensation Commission Appeal No. 93953, decided December 8, 1993. Furthermore, medical records are not conclusive or binding on the hearing officer, but his decision indicates that he interpreted the TWCC-73 forms in this way. We should add that the hearing officer is permitted to employ common experience.

We note that even employing the hearing officer's reasoning of crediting medical evidence prior to Dr. X's examination, the claimant said that Dr. H stopped seeing him because his hand was "healed." The last visit proven in the record with Dr. H occurred on January 14, 2002 (and a TWCC-73 takes the claimant off work only through February 2, 2002). Consequently, continuing disability until the date of Dr. X's visit was error even under the theory employed by the hearing officer.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Given that the claimant identified the desire not to compromise his benefits as a primary factor in not returning to work; the medical records showing that his hand

[1] Dr. X is not related in any way to any member of the Appeals Panel.

was well healed with only slight tenderness as of December 21, 2001; that he had stopped seeing Dr. H altogether because his hand was "healed"; the testimony from Dr. X concerning the usual course of burns of this nature; and placing the burden of proof on the carrier to show that disability ended prior to the date he was examined by Dr. X, the decision of the hearing officer is so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust. We reverse and remand for reconsideration of the evidence on disability consistent with the definition found in Section 401.011(16) and placing the burden of proof on the claimant.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **THE GRAY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBERT L. WALLACE
1717 EAST LOOP, SUITE 333
HOUSTON, TEXAS 77029.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Michael B. McShane
Appeals Judge

_____
Margaret L. Turner
Appeals Judge